IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1941.

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, and BARTHOLOMEW DINOLA,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed on page 720 of the Record. The amended opinion is printed on page 745 of the Record.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code as amended by the Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. A. 347).

(2) The judgment of the Circuit Court of Appeals was entered on January 30th, 1942 (R. 729). A petition for rehearing was duly filed (R. 730) and denied on March 4th, 1942 (R. 745).

III.

Statement of the Case.

A full statement of the case is included in the preceding petition under Title IV, page 7.

IV.

ARGUMENT.

POINT I.

Petitioner Ippolito's right to choose whether or not to testify, as guaranteed by the Constitution and Statute, was invaded by Court action.

When the Government announced it had no further evidence to present and rested its case, the defendants made appropriate motions for a directed verdict of acquittal (R. 399). The Trial Court, in refusing to grant the motions of Ippolito and DiNola, did so without stating any reasons (R. 400, 402).

At that time, all that had been proved against Ippolito was that he had, prior to the seizure of the still, met and associated with some of those who were convicted. Such meetings were casual, either at his home, a rooming house, or in public places, like restaurants. Such evidence was not sufficient to warrant an inference of guilt.

United States vs. *Falcone,* 311 U. S. 205, 210.

In the absence of any evidence from which guilt could be properly inferred, it was the plain duty of the Court to grant his motion and acquit him.

Gracefo vs. *United States* (C. C. A. 3), 46 Fed. (2) 852;

Paul vs. *United States* (C. C. A. 3), 79 Fed. (2) 561;

Nicola vs. *United States* (C. C. A. 3), 72 Fed. (2) 780.

If the government did not have sufficient evidence to *prima facie* establish his guilt, it should not have set the indictment for trial.

It will be noted that after the motion for a directed verdict of acquittal was made, the government did not, prior to the Court's decision, request a further opportunity to introduce additional testimony. It was content to rest upon the evidence as it stood when the motion was made.

If the petitioner Ippolito had received, at the Trial Court's hands, that to which the law and justice entitled him, he would have been acquitted, and anything that thereafter transpired at the trial would not have affected that status. The trial so far as concerned him should have ended at that point.

If the Trial Court had ruled correctly on his motion, he would not have been driven to decide whether to take the witness stand and call witnesses, and suffer the possibility of thereby convicting himself, or remain off and not call witnesses at the peril of having inferences drawn against him from his silence or failure to call such witnesses.

The effect of the Trial Court's ruling was to compel the defendant to choose to become a witness against himself. It cannot be said that he freely and without coercion re-

quested to become a witness. He did so only to escape the effects of the erroneous, adverse ruling of the Trial Court. Instead of affording him the protection and shelter which the law gave him, the Trial Court, by its erroneous ruling, removed it completely.

> *Bruno* vs. *United States*, 308 U. S. 287, 293;
> *McKnight* vs. *United States*, 115 Fed. 972, 981.

The Act of March 16, 1878, 20 Stat. at L. 30, c. 37, now 28 U. S. C. A. 632, was enacted in the light of the Fifth Amendment to the Constitution. The statute afforded accused the right to be a witness "at his own request and not otherwise". He was thus given the right to make a free and voluntary choice in that regard without the intrusion of any unlawful coercion, calculated to require him to pursue one course in preference to another. The statute prohibits the exertion by the Trial Court or the District Attorney, of any such coercion, direct or indirect.

Since the Trial Court gave no reason for its ruling, the record reveals no more than would be revealed had the Trial Court deliberately declined to direct a verdict of acquittal for the sole purpose of requiring or coercing the accused into testifying against himself.

The Circuit Court of Appeals did not find it necessary to decide the issue thus presented by the record. Instead it chose to consider that there was present in the record prior to the making of the motion, testimony which was not in fact present. Cf. Bematre's testimony (R. 563).

It ruled that since the trial was in progress at the time the government applied to reopen its main case, and, over objection, was permitted to introduce the testimony of Bematre, the Trial Court in exercising its power to control the order of proof at the trial, did not abuse its discretion.

However, this ruling overlooks the fact that the trial as to Ippolito was in fact in progress, due solely to the erroneous ruling of the Trial Court on the motion, which also resulted in the invasion of his rights hereinbefore outlined. It overlooks the fact that the Trial Court exercised its discretion at a time when, had the law been correctly administered, he should have been freed of any obligation to be present at the trial.

Where a constitutional or statutory right of an accused is invaded, Appellate Courts in seeking to determine the validity of a claim that such right has been invaded, have invariably determined the validity of such claim, by viewing the record as of the time the claimed invasion took place. They have not permitted that which was brought to light through the invasion of the right to affect or destroy or weaken the claim. Thus, when a claim has been made that rights under the Fourth and Fifth Amendments have been invaded due to lack of probable cause, the invasion has been held not cured, justified and legalized by what has followed such unlawful invasion.

Byars vs. *United States*, 273 U. S. 28;
United States vs. *Lefkowitz*, 285 U. S. 452;
Go-Bart Importing Co. vs. *United States*, 282 U. S. 344.

If the Appellate Court had, in reviewing the record on appeal, invoked the aforementioned principles which undoubtedly controlled, it would have declined to consider the evidence which came into the case solely through the invasion of the rights of the petitioner Ippolito.

There is no provision in the New Jersey Constitution similar to that contained in the Fifth Amendment declaring that no person shall be compelled in any criminal case

to be a witness against himself. A man in New Jersey cannot be compelled to be a witness against himself solely by force of the common law.

> *State* vs. *Zdanowicz*, 69 N. J. Law 619, 55 Atl. 743.

However, the courts of New Jersey have recognized that the validity of a court's ruling on a motion to acquit made at the close of the State's case must be tested by the evidence in the case when the motion was made, and not otherwise, for any other course would "come perilously near to compelling the accused to convict himself."

> *State* vs. *Bacheller*, 89 N. J. Law 433;
> *State* vs. *Pruser*, 127 N. J. Law 97.

We have been unable to find any Federal decisions which have ruled on the precise question herein presented.

This Court has repeatedly declared that constitutional provisions for the security of persons and property, are to be liberally construed, and "it is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon".

> *Boyd* vs. *United States*, 116 U. S. 616, 635;
> *Byars* vs. *United States*, *supra*.

Of course, similar considerations must be afforded statutes which are enacted to carry into effect and safeguard such constitutional provisions.

If the action of the Court below is not reversed, a practice will be sanctioned which would permit the denial of an accused's motion for a directed verdict of acquittal, although there is no evidence in the record tending to establish his guilt. Such a practice would compel an accused at

his peril, to either forego making a defense on the merits, or else continue the trial and risk the possibility of having his own testimony or the testimony of such witnesses as he may call, convict him. Only by adherence to the rule pursued by the courts in New Jersey as cited in the case of *State* vs. *Bacheller, supra,* will the right of an accused be properly safeguarded and the protection intended by the constitutional and statutory provisions fully and effectively assured.

POINT II.

Petitioners were denied a fair trial by the District Attorney's misconduct.

The District Attorney deliberately elicited testimony that petitioner DiNola and another attacked and robbed a witness. The court below found that the robbery had no bearing upon the charges in the indictment (R. 728). It concluded however that the answers were non-responsive and unsolicited by the United States Attorney (R. 728). Because of this finding it refused to reverse. Yet it is obvious that the questions were not ambiguous and were deliberately designed to produce the testimony complained of (R. 575). Furthermore, as is hereinafter argued, the District Attorney by his improper cross examination of the witness Hahn, brought before the jury hearsay statements that the petitioners and their associates were underworld characters.

It is respectfully urged that the misconduct of the District Attorney in thus deliberately producing testimony of the attack and robbery and improperly blackening the characters of the petitioners, deprived them of a fair trial, and that in failing to reverse for such misconduct the decision

of the court below is in conflict with applicable decisions of this Court and of other authorities.

Berger v. *United States*, 295 U. S. 78;
National Labor Relations Board v. *Air Associates*, 2 Cir., 121 Fed. (2d) 586;
United States v. *Perlstein*, 3 Cir., 120 Fed. (2d) 276;
Scheinberg v. *United States*, 2 Cir., 213 Fed. 757.

The perfunctory direction to the jury to disregard the evidence of the robbery did not cure the error. In fact the court below, in failing to reverse, placed no reliance on such direction (R. 728). This Court and other courts as well have held that an invasion of the right to a fair trial is not to be lightly disregarded and that if the misconduct probably affected the jury the convictions must be reversed.

Berger v. *United States, supra;*
Singer vs. *U. S.*, 58 F. (2d) 74;
Robinson vs. *U. S.*, 32 F. (2d) 505.

In the light of evidence of association the misconduct affected not only DiNola but the other petitioners, and accordingly prejudiced all.

Whealton v. *United States*, 3 Cir., 113 Fed. (2d) 710;
United States v. *Thomson*, 7 Cir., 113 Fed. (2d) 643.

POINT III.

The cross examination of the government witness Hahn by the District Attorney was prejudicial error.

Mrs. Hahn was asked whether any of the petitioners were or were not in a restaurant within a certain period of time, a matter which, as the court below found, had no direct or great significance (R. 726). She testified that she could not recognize any of the petitioners as patrons of that restaurant. The District Attorney knew from her testimony given at a prior trial, a transcript of which was in his possession (R.204,209), that she could only name two persons as patrons. He must have known too from her statement made to a government investigator the day before she testified in the instant trial, that she could not identify any of the petitioners as patrons and intended to give such testimony when called. Hence, when called to the stand, she gave the testimony expected of her. Such testimony was negative in character in that she failed to recognize any of the petitioners.

The District Attorney was accordingly not legally surprised at Mrs. Hahn's testimony. Surprise results only when a witness has given evidence contrary to what the District Attorney had just cause to expect from him, and even then a prior inconsistent statement may not be read if the evidence is merely negative in character and not prejudicial to the government's case. *6 Jones Commentaries on Evidence* (2nd Ed.) pages 4810, 4813. This is necessarily so since the production of the prior contradictory statement is to neutralize the testimony given by nullifying and removing the adverse and unexpected assertion. *Wigmore on Evidence* (3rd Ed.) Section 902.

Since the District Attorney stated that his object in cross examining Mrs. Hahn was to impeach her (a practice which is improper and condemned, *Wigmore on Evidence* (3rd Ed.), Section 896), and to neutralize her testimony counsel for the petitioners properly stated that he would consent that her testimony be struck (R. 186). See *Young* v. *United States*, 5 Cir., 97 F. (2) 200, 205. The offer was declined for the reason which then became apparent that the District Attorney wanted to bring before the jury the hearsay statement alleged to have been made by the witness depicting petitioners as underworld characters and associates of criminals. It is noteworthy that the court below condoned the cross examination on the ground that the District Attorney had the right to refresh the witness' recollection when in fact his stated purpose was merely to neutralize the testimony, and the witness had not indicated a lack of memory.

In deciding that the action complained of was proper the court below decided the case in conflict with applicable decisions of this Court and of other authorities which hold that prior statements may not be used as refreshing material when their use is designed to prejudice the jury against the defendants.

> *Socony Vacuum Oil Co.* v. *United States*, 310 U. S. 150;
> *Young* v. *United States*, 5 Cir., 97 (2d) 200;
> *Sneed* v. *United States*, 5 Cir., 298 Fed. 911;
> *Rosenthal* vs. *United States*, 8 Cir., 248 Fed. 684.

It must be remembered that without Bematre's testimony no case had been made against Ippolito. After Bematre had testified Ippolito's case depended upon whether the jury would believe him or Bematre. The case against him and against Maggio, the evidence as to the

latter being wholly circumstantial, was weak, and the scales being thus delicately balanced any evidence depicting Ippolito and Maggio as criminals or associates of criminals tended to detract from their credence. In such circumstances this Court has held that prejudice is so highly probable that its non-existence may not be assumed. *Berger* v. *United States, supra.*

Accordingly, in failing to reverse for such error the court below failed to follow the applicable decisions of this Court.

POINT IV.

The lower Court's decision by a five-judge court, two of whom had not heard argument, was contrary to the practice assured by the rules to all appellants.

The case was argued before three judges of the Court below, who later concurred in an opinion by which the judgments below were affirmed (R. 719, *et seq.*). A petition for re-hearing was duly filed (R. 730). The case was then re-decided by all five Judges of the Court sitting *en banc* (R. 745).

Petitioners were not invited to orally argue the matter before the additional Judges who had not participated in the original decision. Nor were petitioners advised that the rules of the Court would be relaxed, modified or changed by the Court in deciding their appeal.

In the case of *Commissioner of Internal Revenue* vs. *Textile Mills Securities Corporation,* 117 Fed. (2) 62, 71, affirmed by this Court, 84 L. Ed. 242, the Court below said:

> "It has been the practice for the circuit courts of appeals to sit in groups of three judges. We think the practice is an excellent one which should

> be followed in all but exceptional cases. Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question."

In the case of *Oughton* vs. *National Labor Relations Board*, 118 Fed. (2) 486, 494, the same Court said that a consideration of a case by all Judges of the Court—

> "removes any possibility that the majority opinion of the court, when composed as ordinarily of three judges, may conflict with the majority opinion of the court when composed of one of the same judges and the two remaining judges of the court. The majority opinion of all will be binding upon all regardless of the views of individual judges."

In each of the aforementioned cases, before the five Judges of the Court essayed to participate in the decision, they afforded oral argument to the parties on the issues. This was not accorded the petitioners in this case.

In view of the statements of the Court below, contained in the aforementioned cases, we may properly assume that the instant case was either exceptional or that there was a difference in view among the Judges on a question of fundamental importance, or, that two of the three Judges who had heard argument, had a view contrary to that of the other three Judges of the Court. Despite these reasons which prompted the Court to sit *en banc* and re-decide the case, it did not call for a re-argument.

That oral argument is regarded as of great value to the Courts as well as the litigants is evidenced by the fact

that the Court has itself provided in its rules for such oral argument. The Court's power to relax any rule is not denied. However, where a relaxation of a rule may deprive a litigant of a substantial right or privilege, common justice requires that the litigant be heard before the rule is relaxed. The rule of Court contemplates that all litigants properly before the Court should have an opportunity to orally argue the pertinent issues before the Court arrives at a decision. *A fortiori* is this true in exceptional cases involving questions of fundamental importance.

It is respectfully submitted that by this action complained of, the Court below has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

Conclusion.

For the foregoing reasons, it is submitted that the fundamental questions involved in this application, are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Dated: April 3, 1942.

Respectfully submitted,

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Petitioners.

ANTHONY A. CALANDRA,
on the brief.